

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TERRY A. BURNS</b>	)	
Claimant	)	
VS.	)	
	)	
<b>WILES APPLIANCE CENTER, INC.</b>	)	Docket No. 213,589
Respondent	)	
AND	)	
	)	
<b>FIREMAN'S FUND INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals an Award entered by Administrative Law Judge Jon L. Frobish on September 3, 1997. The Appeals Board heard oral argument on February 25, 1998.

**APPEARANCES**

Claimant appeared by his attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, David S. Brake of Chanute, Kansas.

**RECORD**

The Appeals Board has reviewed and considered the record listed in the Award.

**STIPULATIONS**

The Appeals Board has adopted the stipulations listed in the Award. There is, however, a dispute concerning whether there was a stipulation to a date of accident.

**ISSUES**

The Administrative Law Judge denied all benefits, finding claimant failed to provide proper notice. Because of this finding that notice was inadequate, the remaining issues were not addressed. The parties requested at oral argument that in the event the Appeals Board finds proper notice was given, this matter be remanded to the Administrative Law Judge to

decide the remaining issues. Whether claimant gave notice to his employer within ten days of his accident is the only issue on appeal.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the briefs and arguments, the Appeals Board concludes the Award should be affirmed.

#### **Findings of Fact**

- (1) Wiles Appliance Center, Inc. (Wiles) is a rent-to-own center of household appliances. The business was owned and operated by the husband and wife team of Helen and Willie Wiles.
- (2) Claimant, Terry A. Burns (Burns), started working for Wiles on August 1, 1995. His duties involved doing paperwork, including handling delinquent accounts and delivering merchandise.
- (3) Burns thought he had a verbal agreement to eventually take over the business. Because of this, Burns said he was reluctant to report his injury. Burns eventually decided the business was not profitable and any understanding concerning the transfer of ownership appears to have ended before Burns' last day of work for Wiles.
- (4) Burns was terminated on May 8, 1996. The reason given was a lack of work.
- (5) On or about December 12 or 16, 1995, Burns was using a handcart to unload merchandise from a truck. He leaned over to keep the merchandise from falling and felt his neck pop. He did not have a lot of pain at that time, but over the next three days his neck became very stiff.
- (6) Burns testified that the continuous lifting in his job made his neck hurt. Sometime after his accident he began to notice numbness in his left arm. Burns denies any prior injuries to or problems with his neck, upper back, left shoulder, or arm.
- (7) Burns sought medical treatment for these problems with Dr. Robert Osborn, his family physician, on April 15, 1996. The medical records reflect, however, that Burns had also mentioned having neck pain and stiffness to Dr. Phipps at an office visit in January 1996. There is no mention of any specific trauma, nor is the condition described as work related.
- (8) Approximately April 15, 1996, Burns spoke to Mrs. Wiles about his neck problem. Burns contends that he described this injury as resulting from the accident in December 1995. He further contends that his neck stiffness was obvious to Mr. and Mrs. Wiles during this entire time. Although at one point Burns described the April 15, 1996, conversation as the first time he reported an injury to Mrs. Wiles, at another point in the regular hearing transcript he related that he had a conversation with Mrs. Wiles about three days after his December 1995 accident when he reported his injury.

(9) Mrs. Wiles testified that Burns had a severe cold during the winter and that she knew Burns went to the doctor because his neck was hurting. Mrs. Wiles was informed by Burns, however, that the doctor said he had pulled muscles in his neck from coughing. She said claimant did not mention a work-related accident until mid-April of 1996. At that time, Burns reported a December 1995 accident. Burns filled out an accident report on April 16, 1996, and was put on light duty.

(10) Mr. Wiles, likewise, testified that Burns never mentioned a work-related injury to him before mid-April 1996. During the previous winter, Burns had complained about his neck hurting from coughing, but Mr. Wiles did not recall those neck complaints continuing through the spring.

(11) Two physicians testified in this case. Revis C. Lewis, M.D., is a board-certified neurosurgeon in North Kansas City, Missouri. He examined Burns on September 9, 1996. From the history he was given by Burns, Dr. Lewis related the symptoms of neck pain, left shoulder pain, and left arm numbness to a December 1995 injury at work. Dr. Lewis diagnosed discogenic cervical strain. He did not consider it unusual that Burns did not seek medical treatment for about a month following his accident in December 1995. The condition could have remained asymptomatic for a time and gradually worsened. Although Burns continued to work, Dr. Lewis did not describe any subsequent injury. His opinion was that Burns' injury was caused by the December 1995 injury Burns described. Although Dr. Lewis testified Burns "gradually became worse" it appears he was referring to the symptoms and not to the underlying condition. Dr. Lewis did not describe any accidental injury occurring after December 1995, nor did he opine there was any permanent worsening of Burns' condition from his work activities after December 1995.

(12) Burns was examined by orthopedic surgeon Randall L. Hendricks, M.D., on March 5, 1997, in Tulsa, Oklahoma. The only date of injury Dr. Hendricks was given by Burns was December 1995. He diagnosed mild left C5 radiculopathy but no ruptured disc. Dr. Hendricks opined Burns had probably suffered a clay shoveler's fracture of the C6-7 spinous process which led to swelling and nerve irritation. The fracture was expected to heal and as the swelling goes down the radicular symptoms would eventually go away.

#### Conclusions of Law

(1) The Appeals Board finds that the date of accident was December 16, 1995. An each and every day aggravation thereafter has not been proven.

(2) Kansas workers compensation law requires notice of accident be given to the employer within ten days. For just cause, the notice period may be extended to 75 days.

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the

accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice. K.S.A. 44-520.

(3) The Appeals Board finds Burns did not give notice of accident before April 15, 1996. Because this notice was more than 75 days after the date of accident, notice was not timely. This claim, therefore, is time barred.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated September 3, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS  
David S. Brake, Chanute, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director